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## Introduction. A Remarkable Occurrence: Progress for Civil Society in an "Open" Myanmar

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## INTRODUCTION

### A REMARKABLE OCCURRENCE: PROGRESS FOR CIVIL SOCIETY IN AN “OPEN” MYANMAR

Andrew J. Morgan<sup>†</sup>

*Abstract:* A remarkable thing happened in Myanmar in the summer of 2013. A government that, in recent decades, enacted and carried out among the most draconian and repressive policies toward civil society organizations in the world sat down with a large, representative body of such organizations to hear criticisms of a recently passed law. Perhaps more remarkably, the government then revised the law in response to these criticisms, fundamentally altering the people’s right to freely associate. This introductory piece to the Pacific Rim Law & Policy Journal’s special edition devoted to Myanmar provides context for this seemingly remarkable occurrence. It demonstrates one important and hopeful occurrence in Myanmar’s immense and ongoing reform effort. It is the author’s hope that this occurrence is merely one example of many systemic reforms underway to address the myriad issues facing Myanmar and its people.

#### I. INTRODUCTION: REFORM IN MYANMAR AND NEW OPPORTUNITIES FOR CIVIL SOCIETY

The past three years have seen remarkable change in the country of Myanmar (also known as Burma).<sup>1</sup> With the “opening up” of Myanmar in 2011 after decades of repressive military rule, much attention has been given to reform efforts taking place domestically. Since President Thein Sein came to power in November 2010, the government of Myanmar transitioned from a strictly military government to a military-backed civilian government and has begun a significant reform process.<sup>2</sup> The government freed many political prisoners, including luminary Daw Aung San Suu Kyi, relaxed

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<sup>1</sup> The State Law and Order Restoration Council changed the name of the country from Burma to Myanmar in 1989, following crackdowns on the 1988 protests that led to Aung San Su Kyi’s house arrest, and insisted on its use ever since. See DAVID I. STEINBERG, A VOID IN MYANMAR: CIVIL SOCIETY IN BURMA (1997), available at <http://www.ibiblio.org/obl/docs3/Steinbergpaper.htm>. Although it has been a political issue in the past, with the opposition refusing to accept the name, today Myanmar seems to be used by all sides. Here the term is used without political intent.

<sup>2</sup> See U.S. President Obama Hails Burma’s “Remarkable Journey”, BBC NEWS (Nov. 19, 2012), <http://www.bbc.co.uk/news/world-asia-20386066>.

censorship, and enacted economic reforms.<sup>3</sup> Suu Kyi's National League for Democracy ("NLD") party, which boycotted the 2010 elections that saw Thein Sein's ascendancy, has since rejoined the political process.<sup>4</sup> The NLD party now enjoys a small presence in Parliament after winning by large margins in the April 2012 by-elections, which were deemed generally free and fair.<sup>5</sup> In response to the reforms, many Western nations have relaxed sanctions against Myanmar and begun a process of engagement.<sup>6</sup> Indeed, in light of these reforms and in an effort to bolster U.S. engagement in the country, President Barack Obama became the first sitting U.S. President to visit the country.<sup>7</sup>

Corresponding to the opening up of the country, international nongovernmental organizations ("NGOs") and aid organizations have increased their activities in Myanmar.<sup>8</sup> While there is no doubt that international legal aid and non-governmental organizations can play an active and productive role in Myanmar, these groups should proceed with caution and seek to incorporate collaborative approaches to their aid provision if long-term, sustainable development that enshrines human rights is to be achieved. To that end, it is perhaps helpful to reflect on the criticisms of past international aid provision in order to offer lessons for those interested in assistance in Myanmar, before turning to a promising recent example of collaborative effort between the government and civil society organizations.

This introductory piece proceeds in three parts. Part II discusses the ethical and practical implications of international NGOs and assistance groups working in foreign countries such as Myanmar, with reference to lessons learned in the 1960s Law and Development Movement. Part II concludes with some brief recommendations for collaborative and participatory approaches that take into account these ethical dimensions. Part III provides background and context for the recent reemergence of civil society in Myanmar, including a short history and analysis of the repressive

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> See *Burma poll: Aung San Suu Kyi's NLD sweeps by-elections*, BBC NEWS (Apr. 2, 2012), <http://www.bbc.com/news/world-asia-17588313>.

<sup>6</sup> See, e.g., Paul Eckert, *U.S. lifts more sanctions on Myanmar to support reforms*, REUTERS (May 2, 2013), <http://www.reuters.com/article/2013/05/02/us-myanmar-usa-sanctions-idUSBRE9411AR20130502> (describing the loosening of sanctions by the Obama administration).

<sup>7</sup> See Peter Baker, *Obama, In An Emerging Myanmar, Vows Support*, N.Y. TIMES (Nov. 18, 2012), [http://www.nytimes.com/2012/11/19/world/asia/obama-heads-to-myanmar-as-it-promises-more-reforms.html?\\_r=0](http://www.nytimes.com/2012/11/19/world/asia/obama-heads-to-myanmar-as-it-promises-more-reforms.html?_r=0).

<sup>8</sup> See e.g., *MYANMAR: Call to Build Up Local NGOs*, IRIN HUMANITARIAN NEWS & ANALYSIS (Mar. 1, 2011), <http://www.irinnews.org/report/91949/myanmar-call-to-build-up-local-ngos> (describing the rapid growth of NGOs post-Cyclone Nargis and in the midst of the current reform developments).

policies put in place by preceding government regimes. Finally, Part IV accounts the recent effort to revise and pass the law on associations, which affects all civil society organizations and NGOs with operations in Myanmar.

## II. FINDING FAULT WITH CULTURAL RELATIVISM IN GLOBAL ASSISTANCE EFFORTS: TOWARD A COSMOPOLITAN ASSISTANCE ETHIC

In her seminal article examining the ethical underpinnings of international legal assistance, Professor Shannon Roesler offered a compelling analysis of the legal profession's role in development work.<sup>9</sup> After a brief overview of the increasingly global nature of the practice of law, Professor Roesler posited that "in deciding whether the legal profession should support commitments to global justice, we must resolve another ambiguity: even if lawyers are responsible for the quality of justice in the broader sense, it is not clear that the responsibility extends beyond our national borders."<sup>10</sup>

In a direct response to criticisms of the alleged lack of sensitivity to local and cultural contexts of the Law and Development Movement, Professor Roesler examines the notion that lawyers who "intervene in the social and political processes of other societies in order to promote particular values" are therefore subject to the charge that they are "imposing their own moral and political beliefs on others."<sup>11</sup> The argument that one should not intervene in other societies or cultures is associated with various forms of moral relativism.<sup>12</sup> Theories of moral relativism hold that we can only answer normative questions regarding morality (i.e., what we ought to do) by reference to something else, such as a religious or cultural view of the world.<sup>13</sup>

After a thorough analysis of the practical ethicality of cultural relativism, however, Professor Roesler eschewed the theory in favor of a cosmopolitan ethic.<sup>14</sup> This notion, based on the ideas developed by renowned cultural theorist and philosopher Kwame Anthony Appiah, recognizes equanimity in the dignified human being, across boundaries and cultures, and promotes an ideal of equal moral worth, and a global

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<sup>9</sup> See generally Shannon M. Roesler, *The Ethics of Global Justice Lawyering*, 13 YALE HUM. RTS. & DEV. L.J. 185 (2010).

<sup>10</sup> *Id.* at 204.

<sup>11</sup> *Id.* at 194.

<sup>12</sup> *Id.* at 195.

<sup>13</sup> *Id.*

<sup>14</sup> See generally KWAME ANTHONY APPIAH, *COSMOPOLITANISM: ETHICS IN A WORLD OF STRANGERS* (2006) (outlining cosmopolitanism, the philosopher Kwame Anthony Appiah's seminal cultural theory).



conversation on right and wrong.<sup>15</sup> Ultimately, she concludes that the general objection to international assistance as an imposing force is grounded in theories of moral relativism and subjectivism, “which are not, in the end, very convincing.”<sup>16</sup> Furthermore, she concludes that relativism is not a bar to engaging in the lives of those outside our cultural and political communities; Professor Reosler identifies “strong moral reasons—grounded in the ethical doctrine of cosmopolitanism”—to promote the rule of law and “political justice around the world.”<sup>17</sup>

In grappling with these ethical questions, Professor Roesler’s cosmopolitan global lawyers must guard against imposing legal assistance *carte blanche*—in the Law and Development fashion—if they are to affect legitimate change in the legal environments in which they assist.<sup>18</sup> Roesler suggests that “if lawyers impose a predetermined means to political justice by importing the political institutions, legal rules, and legal strategies with which they are familiar, they risk violating the dignity of those they hope to assist.”<sup>19</sup> She instead suggests that global justice lawyers should focus not on importing familiar laws and institutions, but on facilitating processes of lawmaking and social change.<sup>20</sup>

This latter point—that legal assistance efforts should be thoroughly founded in the local context and in participatory processes—seems to reflect a growing consensus in the literature on the “new law and development movement.”<sup>21</sup> As Professor Kristin Dauphinais asserted, “there is an earnest search for means to ensure that the mistakes of the past are not repeated, and that the new law and development movement is not another unfunded mandate with lofty aspirations and little, or at least unsustainable, means of achieving them.”<sup>22</sup>

To that end, international NGOs, assistance organizations, and the organizations they partner with should recognize the need to involve colleagues from the host country from the outset while establishing the purpose and the goals of their projects.<sup>23</sup> Further, overseas visitors must thoroughly immerse themselves in the local context and culture early in the process and maintain a high level of collaboration throughout all phases to

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<sup>15</sup> Roesler, *supra* note 9, at 203-04.

<sup>16</sup> *Id.* at 194.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 189.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Kirsten A. Dauphinais, *Training a Countervailing Elite: The Necessity of an Effective Lawyering Skills Pedagogy for a Sustainable Rule of Law Revival in East Africa*, 85 N.D. L. REV. 53, 85 (2009).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 85-86.

insure that the reforms they recommend can work in the local context.<sup>24</sup> Finally, advocates should pay particular attention, prior to and during the collaboration, to factors that will help sustain the reforms after the formal consultation ends.<sup>25</sup>

In her own words, and consistent with a "rights-based approach,"<sup>26</sup> Professor Roesler asserted that to avoid the ethical pitfalls of the top-down, imposing model of aid, global justice lawyers should shift their focus from particular legal means or ends to the processes of lawmaking.<sup>27</sup> She states that "instead of thinking of law in positivist terms (as a set of existing rules and institutions), lawyers must think in normative terms (i.e., in terms of what processes will produce law)."<sup>28</sup> Drawing from Thomas McInerney, Professor Fran Quigley traces the evolution from criticisms of the Law and Development Movement to the new, participatory thinking:

A defining characteristic of this formalistic approach to rule of law programming is its reliance on 'transplants' of legal systems characteristic of the global North into developing countries, despite the well-chronicled failure during the 1960s law and development era of this approach. Efforts to transplant a theoretically high-functioning legal system into new postcolonial countries were and are mistakes of both hubris and strategy. Thomas McInerney is among many observers who argue that the countries' own indigenous civil society leadership—which in most cases helped lead the struggle for independence—needed to be supported in their own efforts to grow and apply their own systems of justice. '[I]nclusive and deliberate legal reform is the *sine qua non* for the creation of legitimate law and democracy,' McInerney writes. "The

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> See, e.g., Meena Jagannath et al., *A Rights-Based Approach to Lawyering: Legal Empowerment as an Alternative to Legal Aid in Post-Disaster Haiti*, 10 NW. U. J. INT'L HUM. RTS. 7, 4 (2011) (advocating for a "rights-based approach" to legal aid provision in the aftermath of the earthquake and ensuing disasters in Haiti). This article echoes agreement with proponents of consensus and participatory process. *Id.* According to the authors, a rights-based approach "ensures that the beneficiaries of aid are informed of the processes that affect their lives and have the opportunity to share their perspectives in a meaningful way." *Id.* This is a participatory "outcome" approach to aid provision. *Id.*

<sup>27</sup> Roesler, *supra* note 9, at 184.

<sup>28</sup> *Id.* at 224.

democratic process itself is necessary to determine the content of rights.”<sup>29</sup>

Despite the increasing consensus among international aid practitioners that participatory, collaborative, and consensus-based processes address many of the problems with traditional models of aid provision—particularly among academics—the practical implications of these collaborative approaches offer challenges to aid practitioners on the ground.

The latter point becomes even more pronounced when international aid practitioners are faced with seemingly overwhelming humanitarian and human rights issues, such as those in Myanmar. In this context, the process of revising and updating the law regarding associations (to which all NGOs are subject), which is outlined in Part IV, is a promising example of international organizations empowering local civil society groups to work with the Myanmar government to adapt a law to meet international norms in the domestic context.

### III. CIVIL SOCIETY IN MYANMAR: WHO IS INVITED TO THE TABLE?

Civil society has a long and controversial history in Myanmar. This Part briefly outlines key moments of this history in order to provide context for the recent changes. It is in light of this history that recent events are significant. However, no conversation about the reemergence of civil society is complete without discussing the effects of Cyclone Nargis on mobilizing local and international NGOs, discussed below. Finally, this section briefly sketches the recent repressive policies directed at civil society organizations in Myanmar to set the stage for the recent revisions discussed in section IV.

#### A. *A Brief History of Civil Society in Myanmar*

The reemergence of civil society<sup>30</sup> is among one of the recent and rapid changes occurring in Myanmar. As long time Myanmar expert and

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<sup>29</sup> Fran Quigley, *Growing Political Will from the Grassroots: How Social Movement Principles Can Reverse the Dismal Legacy of Rule of Law Interventions*, 41 COLUM. HUM. RIGHTS L. REV. 13, 40-41 (2009).

<sup>30</sup> Although a loaded term, for the purposes of this discussion, I use the term civil society to mean the collection of:

[N]on-ephemeral organizations of individuals banded together for a common purpose or purposes to pursue those interests through group activities and by peaceful means. These are generally non-profit organizations, and may be local or national [or international],

academic, Professor David I. Steinberg noted, “[c]ivil society is . . . an essential element of political pluralism—the diffusion of power is the hallmark of modern democracies.”<sup>31</sup> The significance, Steinberg posited:

[L]ie[s] in the hypothesis that if civil society is strong and its citizens band together for the common good based on a sense of community or programmatic trust and efficacy . . . [that] translate[s] into overall trust in the political process of democracy or democratization and lead[s] to diffusion of the centralized power of the state.<sup>32</sup>

It is precisely this characteristic of civil society that makes it a threat to autocratic governments.<sup>33</sup> Noting a brief period where civil society flourished between independence and the first military coup, Steinberg then asserts flatly that “[c]ivil society died under the Burma Socialist Programme Party (“BSPP”) . . . more accurately, it was murdered.”<sup>34</sup>

Under the infamously restrictive rule of General Ne Win, he and his advisers managed to smother democracy in Burma, jail hundreds of political leaders without trials, replace Parliament with a military dictatorship, and implement a drastic program, called the Burmese Way to Socialism, which nationalized trade and industry.<sup>35</sup> In the ensuing years, the military built the BSPP from loyal followers of Ne Win to vast numbers<sup>36</sup> and introduced an extremely rigid socialist system that eliminated private business and brought all private organizations under state control.<sup>37</sup> Consistent with this new system, the BSPP virtually closed the state to all outside influence:

No one legally left the country without authorization, visas for foreigners for a period were limited to 24 hours, internal travel was greatly restricted, and foreign and domestic news [sic] subject to complete control or censorship. Foreign missionaries

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advocacy or supportive, religious, cultural, social, professional, educational, or even organizations that, while not for profit, support the business sector, such as chambers of commerce, trade associations, etc.

See STEINBERG, *supra* note 1, at 3.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 5.

<sup>34</sup> *Id.* at 9.

<sup>35</sup> Eric Pace, *Ne Win, Ex-Burmese Military Strongman, Dies at 81*, N.Y. TIMES (Dec. 6, 2002), <http://www.nytimes.com/2002/12/06/world/ne-win-ex-burmese-military-strongman-dies-at-81.html>.

<sup>36</sup> See STEINBERG, *supra* note 1, at 8.

<sup>37</sup> *Id.* at 9-10.

who left on leave were not allowed to return. Private foreign assistance organizations were ordered to depart, and ties between internal groups and their foreign counterparts were truncated as far as possible. Burma had turned from neutral to isolationist, and an official policy of virtual xenophobia was introduced.<sup>38</sup>

Thus, the relatively open society that flourished in post-independence Burma was effectively crushed and brought under the control of the extremely isolationist regime of Ne Win from the years 1962 to 1988.

By mid-1988, food shortages and economic discontent inspired mass protests, often spearheaded by the country's revered Buddhist monks and students.<sup>39</sup> Hundreds of thousands of people marched through the then-capital, Rangoon, calling for a transition to democracy and an end to military rule in the largest mass protests in the country since independence in 1948.<sup>40</sup> The army seized power in a coup, abolished the 1974 Constitution, and silenced the protests by opening fire on unarmed dissidents, leaving more than 3,000 dead, according to official figures.<sup>41</sup> Following the bloody crackdown, the military regime attempted to quell criticism by making cosmetic changes.<sup>42</sup> The ruling BSPP party changed its name to the State Law and Order Restoration Council ("SLORC") and adopted modest economic reforms.<sup>43</sup>

Nevertheless, the military regime's control of civil society continued as before, albeit subject to more external scrutiny and criticism due to the international media attention given to the country following the bloody crackdown of 1988.<sup>44</sup> Indeed, at the time of his report on Civil Society in Burma in 1997, Steinberg wrote that there was "no let up in the attempt to prevent the rise of any pluralistic institutions in the society that could offer avenues of public debate or disagreement over state policies and the role of the military . . . the immediate future for civil society remains bleak."<sup>45</sup> Given this dire outlook a mere fourteen years ago, civil society went underground, remained dormant, and is waiting for its chance to reemerge.

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<sup>38</sup> *Id.* at 10.

<sup>39</sup> JAYSHREE BAJORIA, COUNCIL ON FOREIGN RELATIONS, UNDERSTANDING MYANMAR (2013), available at <http://www.cfr.org/human-rights/understanding-myanmar/p14385>.

<sup>40</sup> Philippa Fogarty, *Was Burma's 1988 Uprising Worth it?*, BBC NEWS (Aug. 6, 2008), <http://news.bbc.co.uk/2/hi/7543347.stm>.

<sup>41</sup> See BAJORIA, *supra* note 39.

<sup>42</sup> See STEINBERG, *supra* note 1, at 8.

<sup>43</sup> *Id.* at 11.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 13.

Mother Nature provided just such a chance, albeit a tragic one, which forever changed the history of civil society activity in Myanmar.

*B. Cyclone Nargis and the Reemergence of Civil Society*

Although still restricted in many important ways, civil society groups in Myanmar have begun to reemerge in larger numbers. As of 2011, Harvard University's Hauser Center for Nonprofit Organizations reported that the government continued to stifle an emergent, but weak, civil society through tight controls on media and threats to punish or restrict organizations that overtly support political activities.<sup>46</sup> Nevertheless, the report found that the government began to allow the growth of independent groups that they perceived as useful or innocuous, especially social services providers.<sup>47</sup> This comment argues that this change was likely due to the reformist attitude of the Thein Sein government. However, one cannot ignore the impact of the most critical event for the growth of civil society in recent Myanmar history: Cyclone Nargis.

Cyclone Nargis, a category four cyclone, is believed to be the worst recorded natural disaster in Myanmar's history.<sup>48</sup> On May 2, 2008, it struck the Irrawaddy Delta region, 250 kilometers (approximately 155 miles) southwest of Yangon, and worked its way inland reaching Yangon late that night.<sup>49</sup> Winds of up to 200 kilometers per hour and tidal surges of up to four meters high caused widespread devastation.<sup>50</sup> As news of the destruction reached newsrooms around the world, the media focused on the government's controversial response to offers of international humanitarian assistance.<sup>51</sup> Stories of the government's refusal to allow entry to foreign personnel from various aid and U.N. agencies and their blockage of military shipments of aid from the American, French, and British Governments

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<sup>46</sup> SOUBHIK RONNIE SAHA, HAUSER CENTER FOR NONPROFIT ORGANIZATIONS, WORKING THROUGH AMBIGUITY: INTERNATIONAL NGOS IN MYANMAR 5 (2011), available at [http://www.hks.harvard.edu/var/ezp\\_site/storage/fckeditor/file/pdfs/centers-programs/centers/hauser/publications/reports/myanmar\\_report\\_final\\_version\\_2011\\_09\\_08.pdf](http://www.hks.harvard.edu/var/ezp_site/storage/fckeditor/file/pdfs/centers-programs/centers/hauser/publications/reports/myanmar_report_final_version_2011_09_08.pdf).

<sup>47</sup> *Id.* at 12.

<sup>48</sup> THE CENTRE FOR PEACE AND CONFLICT STUDIES, LISTENING TO VOICES FROM INSIDE: MYANMAR CIVIL SOCIETY'S RESPONSE TO CYCLONE NARGIS 15, viii (2009), available at [http://www.burmalibrary.org/docs07/Cyclone\\_Nargis\\_and\\_Myanmar\\_Civil\\_Society\\_Response.pdf](http://www.burmalibrary.org/docs07/Cyclone_Nargis_and_Myanmar_Civil_Society_Response.pdf).

<sup>49</sup> INTERNATIONAL CRISIS GROUP, BURMA/MYANMAR AFTER NARGIS: TIME TO NORMALISE AID RELATIONS, ASIA REPORT NO. 161, 2 (2008), available at [http://www.crisisgroup.org/~media/Files/asia/south-east-asia/burma-myanmar/161\\_burma\\_myanmar\\_after\\_nargis\\_\\_time\\_to\\_normalise\\_aid\\_relations.pdf](http://www.crisisgroup.org/~media/Files/asia/south-east-asia/burma-myanmar/161_burma_myanmar_after_nargis__time_to_normalise_aid_relations.pdf).

<sup>50</sup> *Id.*

<sup>51</sup> SAHA, *supra* note 46, at 8.

dominated the media.<sup>52</sup> France went as far as to (unsuccessfully) call on the U.N. Security Council to intervene militarily under the responsibility to protect doctrine of international law, an action that is illustrative of the high amount of international pressure sparked by the Cyclone.<sup>53</sup>

Amidst the tragedy of Cyclone Nargis, international pressure led the government to eventually alter its draconian response and allow aid organizations to operate with greater freedom in the country. Many recognize Cyclone Nargis as something of a turning point for the humanitarian space in Myanmar.<sup>54</sup> According to one report, there were only forty international NGOs operating on the ground in Myanmar prior to Cyclone Nargis.<sup>55</sup> In the following year alone, the number grew to over 100.<sup>56</sup> Because most local civil society groups are not registered, it is difficult to get an accurate estimate of their numbers and thereby project their growth.<sup>57</sup> Nevertheless, international organizations operating in Myanmar at the time that were interviewed by the Hauser Center observed a rise in the number of local groups as well as their overall level of activity post-Cyclone Nargis.<sup>58</sup> The response to the devastation wrought by Cyclone Nargis represented a turning point for civil society in Myanmar where government policies took a backseat to humanitarian imperatives, and, perhaps, were altered indefinitely.

*C. NGO Policies in Myanmar Have Been Restrictive and Out of Step with International Norms.*

Civil society organizations have been subject to the extremely restrictive policies of the military regimes in Myanmar, making it virtually impossible to carry out impactful work. Indeed, the government at various times has banned even small gatherings of individuals and has kept extremely tight control on those organizations that it has allowed to operate in country.<sup>59</sup> All of this made for a populace that was extremely reluctant to

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<sup>52</sup> *Id.*; *UN Frustrated at Burma Response*, BBC NEWS (May 13, 2008), <http://news.bbc.co.uk/2/hi/asia-pacific/7397012.stm>.

<sup>53</sup> *Id.*

<sup>54</sup> *See, e.g.*, SAHA, *supra* note 46, at 8.

<sup>55</sup> *Id.*

<sup>56</sup> *See, e.g.*, *MYANMAR: Call to Build Up Local NGOs*, *supra* note 8, (noting that in 2008, Cyclone Nargis spawned hundreds of civil society organizations to cope with the humanitarian crisis that killed a reported 140,000 people and affected another 2.4 million people by U.N. estimates, and quoting Aung Tun Thet as saying that “Nargis was a catalytic push for the mushrooming of local NGOs. There were 50 times as many NGOs as before.”).

<sup>57</sup> *See* SAHA, *supra* note 46, at 8.

<sup>58</sup> *Id.*

<sup>59</sup> *See* STEINBERG, *supra* note 1.

speak out on any political or human rights issues for fear of imprisonment or other harsh measures by the government.<sup>60</sup> Domestically and internationally based NGOs and other civil society organizations are among the organizations that have been hindered by the government's restrictive policies over the years.<sup>61</sup>

### 1. *NGOs as Civil Society Actors*

Non-governmental organizations have existed for centuries, but the term NGO is relatively young.<sup>62</sup> Although defined in different ways, "NGO" is generally understood to refer to "a formal organization that is neither a government nor a corporate institution, but rather a voluntary association within civil society."<sup>63</sup> As Professor Jenkins defined it, "civil society facilitates exchanges among citizens, enables communication channels between citizens and the state, promotes civic action, and advances common interests based on civility."<sup>64</sup> Thus, Jenkins situated NGOs as "a subset of civil society organizations . . . private and voluntary, practicing self-governance . . . organized around a common mission."<sup>65</sup>

While there are many valid criticisms of NGOs and other civil society organizations, it is worth remembering that civil society has many virtues. First, civil society may serve as a countervailing force against an oppressive government.<sup>66</sup> Even if the government is constituted such that different branches of government check and balance each other, civil society may serve as the ultimate check on the potential abuse of public power if these safeguards fail to work properly.<sup>67</sup> Second, civil society can organize the public for democratic participation, and this participation in associations may inspire citizen interest in public affairs.<sup>68</sup> Third, participation in civil society can inculcate civic values and socialize people to be responsible citizens.<sup>69</sup>

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<sup>60</sup> See generally EMMA LARKIN, *FINDING GEORGE ORWELL IN BURMA* (2006) (describing her journalistic pursuits in the country prior to the Thein Sein government's current reform efforts and her stifled attempts to speak with political dissidents).

<sup>61</sup> See MYANMAR: *Call to Build Up Local NGOs*, *supra* note 8.

<sup>62</sup> Garry W. Jenkins, *Nongovernmental Organizations and the Forces Against Them: Lessons of the Anti-NGO Movement*, 37 BROOK. J. INT'L L. 459, 467 (2012).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 468.

<sup>65</sup> *Id.*

<sup>66</sup> Nancy L. Rosenblum & Robert Post, *Introduction*, in CIVIL SOCIETY AND GOVERNMENT 1 (2002).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*



The many criticisms that NGOs face, while important and worthy of debate, can have the unfortunate effect of being usurped by isolationist governments, such as Myanmar's, in order to justify cracking down and instilling restrictive policies on legitimate organizations that are perceived as threats to the government.<sup>70</sup> Under the reformist President Thein Sein's government, the number of small community-based groups providing social, health, and education services grew rapidly.<sup>71</sup> Yet groups continue to operate under the constant threat of repercussions, as they may not be officially or properly registered.<sup>72</sup> Governments in China, Myanmar, Cambodia, and several other Asian countries have implemented policies that impose severe funding and other restrictions on NGOs.<sup>73</sup> These policies prevent NGOs from operating effectively or at all, in some cases.<sup>74</sup>

## 2. *NGO Registration Laws in Myanmar*

The SLORC passed a restrictive association law in the wake of the 1988 crackdown<sup>75</sup> that governed the process for NGOs and civil society organizations to legally operate in the country.<sup>76</sup> The Law Relating to Forming of Organizations No. 6/88 contained broad, vaguely defined restrictions that effectively banned any civil society organization from registering unless it maintained close ties to the government.<sup>77</sup> Under the law, a member of an organization that was deemed to "disrupt law and order, peace and tranquility"<sup>78</sup> could be sentenced to up to five years imprisonment,<sup>79</sup> while someone found to have any link to an unregistered

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<sup>70</sup> See, e.g., Brian Whitaker, *Egypt's Raids on NGOs are About Control*, THE GUARDIAN (Dec. 30, 2011), <http://www.theguardian.com/commentisfree/2011/dec/30/egypt-raids-ngos-beleaguered-regime-light> (discussing the Egyptian government's restrictive policies toward civil society organizations in that country).

<sup>71</sup> Paul Vrieze, *Civil Society and MPs Draft 'Progressive' Association Registration Law*, THE IRRRAWADDY (Oct. 21, 2013), <http://www.irrawaddy.org/burma/csos-mps-draft-progressive-association-registration-law.html>.

<sup>72</sup> *Id.*

<sup>73</sup> See Joshua Lipes, *Restrictions Hamper NGO Funding, Operations in Asia*, RADIO FREE ASIA (Feb. 28, 2013), <http://www.rfa.org/english/news/myanmar/ngos-02272013195650.html>.

<sup>74</sup> *Id.*

<sup>75</sup> See *infra* Part III(A).

<sup>76</sup> See Law relating to Forming of Organizations, 1988, No. 6/88 (Myan.), available at <http://www.icnl.org/research/library/files/Myanmar/State%20LORC%20Law%20No.pdf>.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at ch. III(5)(b).

<sup>79</sup> *Id.* at ch. IV (stating that "Punishments 6. Any person found guilty of committing an offence under Section 3 Sub section (c) or Section 5 shall be punished with imprisonment for a term which may extend to five years.").

organization could face up to three years in prison.<sup>80</sup> These harsh punishments and draconian policies violated the Myanmarese right to freely associate.<sup>81</sup>

The current Constitution of Myanmar, which was published in 2008 following a referendum, enshrines the freedom of association. Paragraph 354 of the 2008 Constitution states as follows:

Every citizen shall be at liberty in the exercise of the following rights, if not contrary to the laws, enacted for Union security, prevalence of law and order, community peace and tranquility or public order and morality<sup>82</sup>: 1. to express and publish freely their convictions and opinions<sup>83</sup> 2. to assemble peacefully without arms and holding procession;<sup>84</sup> 3. to form associations and organizations . . .<sup>85</sup>

Despite this guarantee, the laws and processes put in place by the regime in 1988 hampered the free association of individuals, in particular those related to the formation of civil society and non-governmental organizations. This led many NGOs to criticize and pushback against the opaque and cumbersome registration process and the harsh potential punishments for not doing so.<sup>86</sup> In spite of this historical practice of restricting civil society organizations, the current Myanmar government under Thein Sein has shown increasing willingness to relax the restrictions and bring them in line with international standards.

#### IV. THE RECENTLY REVISED ASSOCIATION LAW PROPOSED IN PARLIAMENT WAS THE PRODUCT OF A COLLABORATIVE LEGAL PROCESS

In response to criticisms, the Thein Sein government began to signal its willingness to adopt reforms, and the Parliament began to legislate in the spring and summer of 2013.<sup>87</sup> On July 27, 2013, the Public Affairs

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<sup>80</sup> *Id.* at ch IV (stating that “7. [a]ny person found guilty of being a member of, or aiding and abetting or using the paraphernalia of organizations that are not permitted to form or not permitted to continue in existence and provided in Section 3 Sub section (c) or that are not permitted to form as provided in Section 5 shall be punished with imprisonment for a term which may extend to three years.”).

<sup>81</sup> CONSTITUTION OF THE REPUBLIC OF THE UNION OF MYANMAR, § 354, [2008], *translated at* [http://www.burmalibrary.org/docs5/Myanmar\\_Constitution-2008-en.pdf](http://www.burmalibrary.org/docs5/Myanmar_Constitution-2008-en.pdf).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at § 354(a).

<sup>84</sup> *Id.* at § 354(b).

<sup>85</sup> *Id.* at § 354(c).

<sup>86</sup> SAHA, *supra* note 46, at 8.

<sup>87</sup> Vrieze, *supra* note 71.

Management Committee of Myanmar released a revised law called the Draft Law on Associations.<sup>88</sup> “The Draft Law raised several critical concerns, including: constraints on unregistered associations, problematic registration procedures, re-registration requirements, and troubling ambiguities on several issues” that would make it difficult for domestic and foreign NGOs alike to safely carry out their programs without fear of reprisal.<sup>89</sup>

In an unprecedented show of collaboration, however, on August 15, 2013, representatives from more than 275 civil society organizations (local and foreign), community-based organizations, and networks met with Myanmarese Members of Parliament and the Parliamentary Affairs Committee regarding the Draft Law.<sup>90</sup> The organizations made a slate of recommendations and presented a civil society-developed alternative version of the Draft Law on Associations.<sup>91</sup> On August 19, 2013, before the close of Parliament for the September recess, the lower house issued a revised version of the Draft Law, with a revised title—the Association Registration Law.<sup>92</sup> This draft reportedly reflects a number of key comments made by CSOs during consultations.<sup>93</sup> On August 29, 2013, the revised Draft Association Registration Law was posted on Parliament’s website (in Burmese only).<sup>94</sup>

Despite the remarkable occurrence of the government meeting with and responding directly to concerns raised by civil society organizations given the military government’s historically repressive treatment of them, the law still included several draconian policies, including harsh punitive measures that were not in line with international standards.<sup>95</sup> Perhaps even more remarkably then, on November 4, 2013, the newspaper published another revised version of the Draft Association Registration Law that abandoned some of the more draconian measures and reflected further substantial improvement over prior versions, including the July 27th and August 19th versions of the draft law.<sup>96</sup>

Despite the Draft Law reportedly continuing to contain some concerning elements,<sup>97</sup> the process of collaboration between the government

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<sup>88</sup> INT’L CTR. FOR NOT-FOR-PROFIT LAW, NGO LAW MONITOR: MYANMAR (BURMA) (2014), available at <http://www.icnl.org/research/monitor/Myanmar.html>.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *See id.*

<sup>96</sup> *See id.*

<sup>97</sup> *Id.*

and civil society in revising and drafting the law nicely illustrates the changing winds of reform in Myanmar. The collaborative, participatory approach heralded by international NGOs and pushed by local, grassroots actors seems precisely the kind of rights-based approach to organic legal reform of which adherents of the Cosmopolitan legal ethic would approve.

## V. CONCLUSION

The occurrences that have taken place in Myanmar in the past five years are nothing short of remarkable—both in their rapidity and their far-reaching implication. To Burma watchers and those with interest in issues of democratization and transitional development, the reforms under Thein Sein's civilian, military-backed government have offered a rare glimpse into a government's attempt to transform the country from one of the most repressive in the world to one in line with contemporary standards.

Nevertheless, in spite of many clear and promising moves away from repressive rule, much reform remains to be accomplished. One way to begin to address Myanmar's systemic failures is for the government to open itself to more assistance from the international community and to encourage an open and free civil society. While international organizations should be careful not to repeat past development mistakes and should be cognizant of the failures of previous such movements, the government of Myanmar should also eschew its historically xenophobic policies toward such organizations and allow grassroots organizations to take root and thrive.

The reform effort that occurred during the summer and fall of 2013 with regard to the association laws is a promising illustration of the reformed Myanmarese government. The willingness of the government to meet and collaborate with civil society, and members of Parliament to draft and re-draft a new association law that addressed many of the past law's deficiencies is nothing less than remarkable given its repressive history. Nonetheless, it remains to be seen just how responsive the ultimate law will be to criticisms and whether the punitive and restrictive features of the law will remain in place. The government should continue to pursue reforms in this and other areas in a similarly participatory manner, eventually addressing the many contentious and repressive policies that keep Myanmar's road to reform long and winding.